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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

FACEBOOK, INC. AND SUBSIDIARIES, Plaintiff, v. INTERNAL REVENUE SERVICE, Defendant.	Case No. 3:16-cv-05884-LB **DEFENDANT'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL** **DATE:** June 15, 2017 **TIME:** 9:30 a.m. **LOCATION:** Courtroom 15-C

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NOTICE OF CROSS-MOTION

On June 15, 2017, the IRS will cross-move for an order of partial summary judgment in this Freedom of Information Act ("FOIA") case that holds that (1) this Court lacks jurisdiction to compel the IRS to release records in native format, or to create load files, because Facebook failed to exhaust its administrative remedies; (2) the IRS is not obligated to release records in native format or to create load files where, as here, such materials are not "readily reproducible" within the meaning of the FOIA; and (3) the FOIA does not obligate the IRS to create load files that did not exist at the time of the original FOIA request.

RELIEF REQUESTED

The IRS requests an order granting the IRS's cross-motion for partial summary judgment that the IRS is not obligated to release responsive records in native format or produce load files; and denying Facebook's motion to compel.

SUMMARY OF THE ARGUMENT

The Court should grant the IRS's cross-motion for partial summary judgment and deny Facebook's motion to compel for three reasons. First, Facebook neglected to submit a pre-suit FOIA request to the IRS that specified a desired production format(s). The Ninth Circuit has made clear that the absence of a perfected FOIA request constitutes a failure to exhaust administrative remedies, which in turn deprives this Court of subject matter jurisdiction.[1] Because a failure to exhaust is jurisdictional, the Court can resolve the parties' cross-motions on this ground without reaching the remaining issues.

If the Court concludes that it has jurisdiction, the Court should nevertheless grant the IRS's motion for partial summary judgment. The IRS is not obligated to create load files or produce records in native format because FOIA only requires disclosure of records in formats that are "readily reproducible." The record here demonstrates that it is not technically feasible for the IRS's

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[1] The IRS did not style this motion as one under Rule 12 because Facebook's complaint never alleges that the IRS failed to produce records in a particular format. The absence from the complaint of any allegations concerning Facebook's desire for load files or the production of records in native format may help explain why Facebook styled its motion as one to compel, rather than for partial summary judgment.

Disclosure Offices to (1) review and redact word processing files, spreadsheets, presentation files, or e-mail in native format; or (2) create load files. Even if it were technically feasible, such files would *still* not be "readily reproducible" because the IRS would need to spend thousands of hours reviewing the load files and redacting any information that is statutorily exempt from disclosure. Moreover, the Court cannot compel the IRS to create a load file *after* receipt of a FOIA request, because doing so would violate the well-established principle that FOIA does not obligate an agency to create new records.

It its motion, Facebook argues—based largely on anecdotal evidence from outside the IRS Disclosure Offices—that the IRS can "readily reproduce" (1) spreadsheets, word processing documents, presentation files, and e-mail in native format with metadata intact; or, in the alternative, (2) load files containing the metadata for e-mail. Yet Facebook's construction and application of the "readily reproducible" standard relies on readily distinguishable cases and completely ignores key language from the IRS's FOIA regulations. Facebook's suggestion that this Court import civil discovery concepts into FOIA litigation[2] is similarly unavailing: even Facebook concedes the absence of legal authority for the proposition that "the discovery rules govern FOIA productions."

For all these reasons, the Court should grant the IRS's motion for partial summary judgment and deny Facebook's motion to compel.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND

a. The IRS's Process for Responding to FOIA Requests

The IRS's FOIA process begins when an submits her/his request to the IRS's Central

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[2] Facebook's general litigation strategy appears to be to blur the lines between its pending FOIA litigation, summons enforcement litigation, and United States Tax Court litigation. Facebook may be hoping to convince this Court that a taxpayer's statutory obligation to comply with an IRS summons should be treated as coterminous with the IRS's (completely unrelated) statutory obligation to respond to a FOIA request. Alternatively, Facebook may be hoping to convince this Court to erroneously expand Facebook's right to information under FOIA in light of a professed need for the material in the United States Tax Court. Either goal would be inconsistent with bedrock principles of FOIA jurisprudence. As the Supreme Court has explained, a person's right to information under FOIA is neither diminished nor enhanced by her/his "particular, litigation-generated need for [the requested] materials." N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 n.23 (1978).

Processing Unit located in Atlanta, Georgia. Higley Declaration ¶¶ 4–5. Once received, the IRS assigns the request to one of the IRS's ten Disclosure Offices. Id. The Disclosure Office is responsible for initiating a search for responsive records. Id. There is no requirement that custodians transmit records to the Disclosure Office in native format. Higley Decl. ¶ 12. When responsive documents are received they are uploaded into the Disclosure Office's Automated Freedom of Information Act database ("AFOIA").[3] Id. AFOIA does not store records in native format or retain metadata. Burger Decl. ¶¶ 12-13. Instead, AFOIA converts records into Tagged Image File Format ("TIFF") images using a process that strips the metadata from the record. Burger Decl. ¶ 11–13. TIFF images, like Portable Document Files ("PDF"), do not preserve the metadata from the native document. Souvandara Decl. ¶ 11.

Once the responsive records have been uploaded and converted to TIFF format, the assigned Government Information Specialist reviews the records in AFOIA to determine which, if any, must be withheld because they are statutorily exempt from disclosure. Higley ¶ 15. The Specialist selects an appropriate FOIA exemption, if any, and places it as an overlay on exempt portion(s) of the relevant page/section. Burger Decl. ¶ 15. After the Disclosure Office applies the redactions, the records are exported out of AFOIA as PDF document(s) and released to the requester. See Burger Decl. ¶¶ 15–16.

Given the above-described process and AFOIA's limitations, IRS Disclosure Offices cannot review metadata in native file formats or create and review separate load files containing metadata. See Burger Decl. ¶ 18.

b. Facebook's FOIA Requests

Facebook submitted two FOIA requests to the IRS on August 5, 2016. These requests sought virtually all documents and communications related to the IRS's examination of Facebook for the 2008, 2009, and 2010 tax years, whether those documents were "maintained in electronic or hardcopy format." Compl. Exs. A & B. On September 23, 2016, the IRS Disclosure Office informed Facebook that due to the extremely broad nature of the request, the initial estimated cost to

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[3] AFOIA, which was developed by a subsidiary of CACI International, Inc., has been in use by the IRS since January 2010. Burger Decl. ¶ 6.

search for records was $19,598. See Compl. Ex. D. Such costs did not include the time to be spent reviewing records for responsiveness or redacting statutorily exempt material. Facebook paid this amount on October 5, 2016, and promptly filed suit six days later. See Compl. Ex. E.

Prior to filing suit, Facebook never requested that the IRS produce records (1) in any particular format or (2) along with load files containing various metadata. In the portion of Facebook's FOIA requests specifying how it wished to receive records, Facebook's FOIA requests merely stated, "We do not wish to inspect the records, but desire copies to be made in accordance with Treas. Reg.§ 601.702(c)(4)(i)(G)."[4] See Compl. Exs. A & B. Facebook waited until several months after filing suit to submit a request to undersigned counsel for "certain native electronic files . . . along with email that includes a standard load file." See Pl.'s Mot., Decl. of Jay Cha-Young Kim ¶ 9.

c. Facebook's Discovery Request for Native Files in Pending Tax Court Litigation

On the same day that Facebook filed its FOIA complaint, Facebook filed a petition in the United States Tax Court for a redetermination of its notice of deficiency. See Tax Court Docket No. 21959-16. On January 20, 2017, Facebook issued to the IRS what Facebook described as a "narrow initial First Informal Document Request in accordance with Tax Court Rule 70(a)(1)." See Hartford Decl. Ex. 1 ("Branerton Request"). Facebook's Branerton Request sought many of the same records at issue in this FOIA litigation. Specifically, Facebook requested "all reports, memoranda, spreadsheets, or workpapers that analyze, evaluate, compute, support, explain, or otherwise form the basis of the IRS" Notice of Deficiency for the 2010 tax year. Id. Unlike its FOIA request, Facebook's Branerton Letter explicitly stated that records should be produced in native format. Id.

d. Involvement of IRS Chief Counsel in Litigated FOIA Requests

The Office of Chief Counsel does not, as a standard practice, use e-discovery review tools for purposes of document review in connection with FOIA litigation or in response to a FOIA request. Hartford Decl. ¶ 13. The IRS Office of Chief Counsel, Procedure and Administration ("P&A") is

[4] Treas. Reg. § 601.702(c)(4) sets forth the required form for making FOIA requests. FOIA requests must "[s]tate whether the requester wishes to inspect the records or desires to have a copy made and furnished without first inspecting them." Treas. Reg. § 601.702(c)(4)(i)(G).

responsible for coordinating the FOIA litigation. See Hartford Decl. ¶ 7. By contrast, the Large Business and International (LBI) Division of the Office of Chief Counsel is responsible for responding to Facebook's litigation in the United States Tax Court. Hartford Decl. ¶ 8.When there is a simultaneous FOIA request and Tax Court litigation, the Office of Chief Counsel tries to coordinate responses to the FOIA request with the ongoing Tax Court litigation. Hartford Decl. ¶ 10.

After Facebook filed its FOIA suit and petition in United States Tax Court, the Office of Chief Counsel determined that LBI and P&A should coordinate to process the documents responsive to Facebook's two FOIA requests and Facebook's overlapping Tax Court discovery requests. See Hartford Decl. ¶ 11.

e. IRS Chief Counsel's Capacity to Create, Review, and Redact Metadata/Load Files Using Clearwell

In this case, the IRS Office of Chief Counsel decided to use Clearwell version 8.2.0 as its platform for reviewing and redacting documents collected in connection with Facebook's document requests in both the Tax Court litigation and this FOIA suit. Hartford Decl. ¶ 13; Souvandara Decl. ¶ 6. Clearwell enables users to "tag" records or information that are privileged or otherwise statutorily exempt from disclosure. Souvandara Decl. ¶ 11. The software requires that records be converted into PDF/TIFF files prior to implementing the redactions. Souvandara Decl. ¶ 11.

Clearwell cannot efficiently review and redact metadata in native format or load files. See Souvandara Decl. ¶ 12. Such review and redaction is critical, however, because metadata commonly associated with spreadsheets, word processing documents, presentation files, and e-mail may contain information that is statutorily exempt from disclosure. See Hartford Decl. ¶ 15. For example:

- Comments: comments stored as metadata may reveal deliberative, work product, or attorney client material that is exempt from disclosure under 5 U.S.C. § 552(b)(5);
- Email Subject: a user might title an e-mail in a manner that reveals deliberative, work product, or attorney client material that is exempt from disclosure under 5 U.S.C. § 552(b)(5) (e.g., "Counsel believes evidence not admissible under FRE 403");
- File Name: a filename could reveals deliberative, work product, or attorney client material that is exempt from disclosure under 5 U.S.C. § 552(b)(5) (e.g., "Counsel justification for conceding penalties");

- FilePath: A user might save a file to a location that reveals material prohibited from disclosure under 26 U.S.C. § 6103[5] and 5 U.S.C. § 552(b)(3) (e.g., Facebook-related document saved to a location associated with an exam of a different transfer-pricing investigation);
- Email Sender/Recipient: These metadata fields may contain the names or e-mail addresses of individuals that would otherwise be exempt from mandatory disclosure under 5 U.S.C. § 552(b)(6) because doing so would constitute an unwarranted invasion of privacy.

See Hartford Decl. ¶ 15 (list not exhaustive); Souvandara Decl. Ex. 1 (listing dozens of metadata fields).

Though inefficient, one mechanism by which Clearwell might facilitate the review of metadata would be through the creation of "load files," which are files that list the specific metadata associated with each record. See Souvandara Decl. ¶¶ 13–14. To review the load files for any applicable exemptions in this FOIA case, the IRS would first need to develop a process for (a) creating the load file; (b) conducting a line-by-line exemption review of the metadata listed in each load file for each responsive document; (c) manually redacting exempt data elements contained in the metadata fields in each load file; and (d) releasing the redacted load file in PDF or TIFF format. Souvandara Decl. ¶¶ 15–16.

f. Preliminary Estimate of Minimum Burden to Review and Redact Metadata/Load Files Using Clearwell

At this early phase of FOIA processing, there is insufficient information to precisely calculate the additional burden associated with creating, reviewing, and redacting load files. This is because the number and size of load files is directly related to the yet-unknown number of responsive electronic records to be reviewed. Given the information available, however, the process of creating and reviewing load files would almost certainly require the IRS to dedicate thousands of additional hours to Facebook's FOIA requests.

To date, the IRS has collected approximately 1.9 million potentially responsive documents. Hartford Decl. ¶ 12. A preliminary query of these records using the parties' agreed-upon search strings returns at least 320,000 potentially responsive records. Id. Although the IRS has never

[5] Section 6103 prohibits the disclosure of tax return information filed with the IRS. See generally Americans for Prosperity Found. v. Harris, 809 F.3d 536, 542 (9th Cir. 2015).

before reviewed load files for exemptions in a FOIA case, an IRS Chief Counsel attorney working full time on document review generally can review approximately one page every two minutes. See Hartford Decl. ¶ 19. Assuming that only 10% of the potentially responsive records are actually responsive and contain metadata, the IRS would need to create load files to account for at least 32,000 documents. Even if the effort required to review the metadata for each document was roughly equivalent to the effort required to review as a single page of text, IRS Chief Counsel attorneys would need to expend *at least* 1,067 additional hours performing just the first level of review.[6] Importantly, this ballpark estimate does not reflect the fact that in practice, attorneys in the IRS Office of Chief Counsel must perform *multiple* levels of review prior to releasing materials to FOIA requesters. See Hartford Decl. ¶ 14.

II. ARGUMENT

a. Standard of Review

Judicial review under FOIA follows somewhat different procedures than in other suits. Trials and discovery are disfavored, and a district court should first attempt to resolve the matter based on detailed affidavits or oral testimony. E.g. Lane v. DOI, 523 F.3d 1128, 1134 (9th Cir. 2008); Long v. IRS, 742 F.2d 1173, 1182 (9th Cir. 1984)). Consequently, FOIA cases are typically decided on summary judgment. Lane, 523 F.3d at 1134 (quoting Miscavige v. IRS, 2 F.3d 366, 369 (11th Cir. 1993)); see generally Military Audit Project v. Casey, 656 F.2d 724, 738 (D.C. Cir. 1981) (summary judgment on basis of agency affidavits warranted "if the affidavits describe the documents and the justifications for nondisclosure with reasonably specific detail, demonstrate that the information withheld logically falls within the claimed exemption, and are not controverted by either contrary evidence in the record nor by evidence of agency bad faith").

In the E-FOIA context, the agency's conclusions concerning technical feasibility and reproducibility are entitled to substantial deference. E.g., Snyder v. Dep't of Def., No. 14-CV-01746-KAW, 2015 WL 9258102, at *7 (N.D. Cal. Dec. 18, 2015). While FOIA generally mandates a "de novo" standard of review, the E-FOIA amendments specifically require that the Court "accord substantial weight to an affidavit of an agency concerning the agency's determination as to . . . reproducibility under paragraph (3)(B)." 5 U.S.C. § 552(a)(4)(B). The legislative history of the E-FOIA provisions confirms Congressional deference to agencies on matters of reproducibility. See, e.g. H.R. Rep. 104-795 at *22 (1996) ("This deference is warranted because agencies are the most familiar with the availability of their own technical resources to process, redact, and reproduce records"); S. Rep. 104-272 at *14–15 (1996) ("As a general rule, the decision whether to disclose requested records or information in a new requested form, whether electronic or other form, is a matter of administrative discretion. In exercising that discretion, agencies should consider administrative efficiency and the existence of identified public demands for the information.").

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[6] To illustrate: if the IRS produces 5,000 documents in a single production, Clearwell will generate a single load file with 5,000 lines (one for each document) and however many columns worth of load file data are reported. Hartford Decl. ¶ 16.

b. The Court Lacks Jurisdiction to Compel the IRS to Produce Records in Native Format or to Create Load Files Because Facebook Failed to Exhaust its Administrative Remedies

i. A FOIA requester cannot challenge an agency's alleged failure to produce records in a particular electronic format unless the requester expressly requested production in that format prior to filing suit.

The Ninth Circuit has made clear that FOIA requires requesters to file a perfected FOIA request and exhaust their administrative remedies before seeking judicial review. See e.g., Ostheimer v. Lindquist, 972 F.2d 1341, 1992 WL 185482 at *1 (9th Cir. 1992) (table) (dismissal proper where party failed to comply with FOIA regulations promulgated by agency). "[T]he purposes underlying the exhaustion doctrine include the opportunity for the *agency* to exercise its discretion and expertise and the opportunity to make a record for the district court to review." Joint Bd. of Control of Flathead, Mission & Jocko Irr. Districts v. United States, 862 F.2d 195, 200 (9th Cir. 1988) (quoting In re Steele, 799 F.2d 461, 465–66 (9th Cir. 1986)) (emphasis in original). A FOIA requester fails to exhaust its administrative remedies if, among other things, it submits a FOIA request that does not reasonably describe the records sought. See 5 U.S.C. § 552(a)(3)(A); Marks v. U.S. Dep't of Justice, 578 F.2d 261, 263 (9th Cir. 1978); see also Flowers v. I.R.S., 307 F. Supp. 2d 60, 67 (D.D.C. 2004) ("[O]nly a valid FOIA request can trigger an agency's FOIA obligations").

The FOIA expressly places the burden on the *requester* to ask the agency to provide the records in a certain form or format. See 5 U.S.C. § 552(a)(3)(B) ("In making any record available to a person . . . [under FOIA], an agency shall provide the record in any form or format *requested by* *the person* if the record is readily reproducible by the agency in that form or format.") (emphasis added); Citizens for Responsibility & Ethics in Washington v. U.S. Dep't of Educ., 905 F. Supp. 2d 161, 171–72 (D.D.C. 2012) (hereinafter, "CREW") (plaintiff's request that agency *search* for electronic records did not constitute request for *production* of records in format containing metadata); see generally Lahr v. Nat'l Safety Transp. Bd., Case No. 03-8023-AHM, 2006 WL 2854314, at *9 (C.D. Cal. Oct. 4, 2006) ("If an agency knows "'precisely' which of its records have been requested and the nature of the information sought" from those records, then the records requested have been adequately described."). This approach is consistent with the proposition that a court's authority to grant relief under FOIA is dependent on a showing that an agency has (1) improperly (2) withheld (3) agency records. See Kissinger v. Reporters Comm. For Freedom of the Press, 445 U.S. 136, 150 (1980) (specifying test for "improper withholding"); Cavezza v. U.S. Dep't of Justice, 113 F. Supp. 3d 271, 275 (D.D.C. 2015). It follows that an agency cannot "improperly" withhold information that the FOIA requester never asked for in the first place.

Where a FOIA requester challenges the adequacy of the agency's response based on a ground not raised at the administrative level, the proper course is to deny the challenge for lack of subject matter jurisdiction. See e.g., Olsen v. U.S. Dep't of Transp. Fed. Transit Admin., Case No. C 02-00673 WHA, 2002 WL 31738794, at *2–3 (N.D. Cal. Dec. 2, 2002) (plaintiff could not raise specific challenge to adequacy of search for first time in litigation); see also In re Steele, 799 F.2d at 465–66. Indeed, it is "impermissible" for a FOIA requester "to expand a FOIA request after the agency has responded and litigation has commenced." Gillin v. IRS, 980 F.2d 819, 823 n.3 (1st Cir. 1992); Laughlin v. Comm'r, 117 F. Supp. 2d 997, 1002 n.10 (S.D. Cal. 2000).

ii. Facebook failed to exhaust its administrative remedies because its FOIA requests did not indicate its preference for records to be produced in native format or for the IRS to create load files

Facebook never requested that the IRS produce records in native—or any other—format prior to filing suit. Nor did Facebook specifically request that the IRS create load files containing e-mail metadata. Instead, Facebook's FOIA requests merely asked that the IRS search for records maintained in electronic or hardcopy format, and for "copies to be made in accordance with Treas. Reg. § 601.702(c)(4)(i)(G)." See Compl. Exs. A & B. Facebook's failure to specify the format of production is particularly striking, given that the company's discovery requests in the United States Tax Court demonstrate that it knows how to specify a production format. See Hartford Decl. Ex. 1 (Branerton Request instructing that documents "should be produced in its native file format").[7] A similar failure by a FOIA requester to specify the desired production format led the court in CREW to hold that the agency had no obligation to produce e-mail metadata. See CREW, 905 F. Supp. 2d at 171–72 (FOIA requester "did not request that [the agency] *produce* its records in electronic format, much less electronic format with metadata") (emphasis in original).

By failing to submit a sufficiently detailed FOIA request, Facebook deprived the IRS Disclosure Office of a fair opportunity to determine (1) whether the request for production in native format or creation of load files constituted a proper FOIA request, (2) whether the requested records were reproducible in the requested format, (3) whether release of Excel files that did not require redaction or contain metadata would have satisfied Facebook; or (4) whether (and how much) to invoice Facebook for the fees to search and review metadata. See Joint Bd. of Control, 862 F.2d at 200 (agency entitled to "opportunity to make a record for the district court to review").

It is legally irrelevant that Facebook telephoned undersigned counsel during the first three months of 2017 to ask—for the first time—that the IRS produce records in a particular format. See Pls' Mot. Kim Decl. ¶ 9. Facebook should not be permitted to bypass the IRS Disclosure Office, file suit, and then demand that *other* IRS components use their e-discovery tools to produce records in a never-before-requested format. Indeed, the government is unaware of any authority that would authorize a FOIA office to commandeer technology from other agency organizational units in order to satisfy a FOIA request for a particular output format.

In sum, because Facebook's FOIA requests did not "reasonably describe" any preferred output format, the IRS was never on notice of, and thus had no obligation to accommodate,

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[7] Unlike Facebook, the plaintiffs in each of the state court cases that Facebook cites managed to make specific requests for metadata or that the records be produced in a particular format *prior* to filing suit. See Fagel v. DOT, 991 N.E.2d 365, 367 (Ill. App. Ct. 2013) (specific pre-suit request for unlocked Excel spreadsheet); Irwin v. Onondaga Cty. Res. Recovery Agency, 895 N.Y.S.2d 262, 264 (2010) (specific pre-suit request for metadata associated with particular photographs); O'Neill v. City of Shoreline, 170 Wash. 2d 138, 143, 148 (2010) (specific pre-suit request for e-mail metadata); Lake v. City of Phoenix, 222 Ariz. 547, 548 (2009) (en banc) (specific pre-suit request for metadata associated with backdated police supervisor's notes).

Facebook's format demands. See CREW, 905 F. Supp. 2d at 171–72. Facebook's post-litigation discussions with government counsel did not transform Facebook's original FOIA requests into proper requests that reasonably described Facebook's preferred release format or desire for load files. Facebook's request constitutes an impermissible attempt to expand the scope of its FOIA requests. Gillin, 980 at 823 n.3 (1st Cir. 1992); Laughlin, 117 F. Supp. at 1002 n.10. Accordingly, the Court should hold that, as a matter of law, Facebook has failed to exhaust its administrative remedies, and the Court lacks jurisdiction to compel the IRS to produce records in native format or to create load files.

c. The IRS Cannot "Readily Reproduce" Load Files or Word Processing Files, Spreadsheets, Presentation Files, and E-mail in Native Format

i. A file format that does not permit the IRS to readily review, redact, and disclose non-exempt portions of records is not "readily reproducible" for FOIA purposes

FOIA only requires disclosure of records in requested formats that are "readily reproducible" by the agency. 5 U.S.C. § 552(a)(3)(B). The use of the qualifier "readily" reflects that E-FOIA's requirements were not meant to require disclosure if records were reproducible only with substantial costs or disruptions to agency operations. See TPS, Inc. v. United States DOD, 330 F.3d 1191, 1195 (9th Cir. 2008) (concluding that when "evaluating reproducibility, the agency should employ a standard of reasonableness").[8] In passing the 1996 E-FOIA amendments, Congress expressly recognized that the need to redact information constituted a proper justification for not producing records in a particular format:

> Likewise, the "reasonable efforts" qualification could relieve agencies of the obligation of releasing the original form of partially exempt records in circumstances where agencies need to handle the records in a certain form for purposes of redaction and, therefore, cannot readily disclose them, as redacted, in a previously existing form.

S. Rep. 104-272 at *15; see also H.R. Rep. 104-795 at *22 (deferential standard of judicial review

[8] The extent to which the analysis in TPS, Inc. applies to non-Defense agencies is unclear because the court's analysis substantially relied on language in the Defense Department's FOIA regulations, rather than the statutory text. But see Scudder v. Cent. Intelligence Agency, 25 F. Supp. 3d 19, 32 (D.D.C. 2014) (acknowledging TPS, Inc.s' reliance on DoD regulation, but holding agency must provide records in an existing format absent "specific, compelling evidence as to significant interference or burden").

for reproducibility).

In the Ninth Circuit, courts must evaluate whether a requested format is "readily reproducible" in light of the agency's FOIA regulations. See TPS, Inc., 330 F.3d 1191 (interpreting "readily reproducible" in light of DoD FOIA Regulation, 32 C.F.R. § 286.4(g)(2)); cf. Ostheimer v. Lindquist, 972 F.2d 1341 (9th Cir. 1992) (analyzing exhaustion of administrative remedies in light of Treasury's FOIA regulations). Under the Treasury regulations applicable to the IRS:

> The term readily reproducible means, with respect to electronic format, a record or records that can be downloaded or transferred intact to a floppy disk, computer disk (CD), tape, or other electronic medium using equipment currently in use by the office or offices processing the request. *Even though some records may initially be readily reproducible, the need to segregate exempt from nonexempt records may cause the releasable material to be not readily reproducible.*

26 C.F.R. § 601.702(c)(2)(ii) (emphasis added).

ii. It is not "technically feasible" for the IRS Disclosure Offices to produce records in native format or to create load files

The IRS's declarations, which are entitled to substantial deference, 5 U.S.C. § 552(a)(4)(B), demonstrate that AFOIA, which IRS Disclosure Offices have used since 2010, is incapable of producing records in native format or creating load files. AFOIA converts all native format records into TIFF images, strips the metadata from the record, and cannot export metadata to create load files. Burger Decl. ¶¶ 11–13, 18. Thus, the release by the IRS Disclosure Offices of load files or records in native format is not even "technically feasible," much less "readily reproducible." See 26 C.F.R. § 601.702(c)(2)(i)).

iii. The IRS cannot "readily reproduce" records in native format with metadata intact or create load files

Even assuming that it *were* technically feasible for the IRS Office of Chief Counsel to use Clearwell to create and review metadata contained in load files,[9] the production of records in native format or with load files would *still* not be "readily reproducible." That is because even with

[9] As previously discussed, the proper focus of the Court's "readily reproducible" inquiry should be on the IRS Disclosure Division, because that is the organization responsible for responding to FOIA requests submitted to the IRS. The only reason that the government discusses the estimated burden on the IRS Office of Chief Counsel is in anticipation of Facebook's argument that the Court should ignore organizational constraints when assessing an agency's ability to comply with a FOIA request.

Clearwell, the IRS would need to spend *thousands* of hours reviewing metadata fields for statutory exemptions. Hartford Decl. ¶¶ 16–19. Moreover, Clearwell would still need to export load files that required redaction as TIFF/PDF. See Souvandara Decl. ¶ 16.

This immense burden does not even account for any of the potential one-time costs such as creating processes, acquiring/augmenting technology, or training employees to review and redact metadata. Imposing this burden on the IRS—or any agency—would be inconsistent with Congress' intent that "[e]lectronic searches should not result in any greater expenditure of agency resources than would have occurred with a conventional paper-based search for documents." H.R. Rep. No. 104-795, at *22.

iv. The evidence and legal authority cited in Facebook's Motion do not establish a genuine dispute as to whether electronic records are "readily reproducible" by the IRS in native format or with load files

Facebook's motion argues, incorrectly, that the IRS can "readily reproduce" electronic records in native format or with load files simply because *some* IRS components purportedly (1) provided copies of Excel files to Facebook in the past, (2) analyzed computer hard drives of IRS employees, or (3) used e-discovery tools as part of a document production *to Congress*. See Pl.'s Mot. at 4–5. As explained below, Facebook's argument is both factually unsupported and legally flawed.

Facebook's "evidence" that the IRS can readily reproduce records in native format is largely irrelevant, because it does not reflect the current capability of *the IRS Disclosure Offices* to produce electronic records. See supra, Section II.B.ii (discussion of why relevant inquiry focuses on FOIA/disclosure offices, rather than agency as a whole). Moreover, the Congressional correspondence Facebook relies upon actually supports the *government's* arguments. Facebook overlooks the portion of the IRS's letter to Senator Hatch that succinctly explains why it is not possible to produce Microsoft Excel spreadsheets in native format:

> There are situations, however, in which materials were produced only to investigators with authority to see information protected by [I.R.C. §] 6103. One such situation . . . is a collection of Excel spreadsheets and associated documents that were produced in native format, *which format cannot be redacted for Section 6103 material*.

Letter from Leonard Oursler, Area Director, Internal Revenue Service, to the Honorable Orrin Hatch, Committee on Finance, United States Senate, August 29, 2013 *available at* http://www.gop.gov/app/uploads/2014/04/IRS_WydenHatchResponse.pdf.[10] (emphasis added).

Facebook's motion also misapprehends the legal standard for whether a format is "readily reproducible." Specifically, Facebook argues that the records it seeks are "readily reproducible" in native format or as load files because they can be "readily copied" in that format. See Pl.'s Mot. at 7. This argument relies on a selective reading of the governing FOIA regulations and three readily distinguishable cases.

To its credit, Facebook acknowledges that the meaning of "readily reproducible" is governed by the text of the IRS's FOIA regulation. See Pl.'s Mot. at 6 (citing 26 C.F.R. § 601.702(c)(2)(i)). Unfortunately, Facebook's motion ignores the final (and crucial) sentence of that regulation: "Even though some records may *initially* be readily reproducible, the need to [redact] exempt from nonexempt records may cause the releasable material to be not readily reproducible." 26 C.F.R. § 601.702(c)(2)(i) (emphasis added). Facebook similarly ignores the legislative history in which the House and Senate expressly recognized that an agency's need to redact exempt material may render records that are initially "readily reproducible" into formats that are not readily reproducible.

Facebook's reliance on the Ninth Circuit's opinion in TPS, Inc., 330 F.3d 1191, and two district courts cases, Public.Resource.org v. United States IRS, 78 F. Supp. 3d 1262 (N.D. Cal. 2015), and Scudder, 25 F. Supp. 3d 19, is also misguided.[11]

In TPS, Inc., the issue before the Court was whether, under the Defense Department's FOIA regulations, the agency was obligated to produce two files in "zipped format." 330 F.3d at 1193. Despite Facebook's contention that the case stands for the proposition that "an agency that has the capability to readily reproduce documents in the requested format must do so, Pl.'s Mot. at 6, TPS, Inc. is distinguishable in at least four ways. First, unlike the IRS here, the Defense Department did not dispute that it had the technical capability of responding to the format request. Id. at 1196.

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[10] The cited language appears on page 13 of the PDF.

[11] Notably, all three cases involve FOIA requesters who specified their preferred format *prior* to filing suit. See supra, Section II.B (Submission of valid FOIA request necessary to exhaust administrative remedies).

Second, the Ninth Circuit's construction of "readily reproducible" was in light of Department of Defense FOIA regulations—rather than the regulations that govern IRS FOIA disclosures. Id. at 1192–93. Third, compliance with TPS's zip format request did not create an obligation for the Defense Department to review metadata or create new load files. And fourth, the limited size and scope of the plaintiff's FOIA request in TPS, Inc. renders that case qualitatively different than the instant matter, in which Facebook has submitted broad FOIA requests. Accordingly, the Court should reject Facebook's contention that TPS, Inc. requires the IRS to produce records in native format or create load files.

Public.Resource.org, 78 F. Supp. 3d 1262, is similarly distinguishable. In that case, the Court ordered the IRS to produce several IRS Forms in the "modernized E-File ("MeF")" format, rather than PDF. Yet unlike Facebook's remarkably broad FOIA requests, Public.Resource.org's requests (1) only sought production of *nine* MeF records, id. at 1265, and (2) did not impose a significant burden on IRS business or its Disclosure Offices, id. at 1265–66 (holding $6,200 expenditure to "develop protocols and train staff" to redact exempt information not significant). Accordingly, Facebook is incorrect that Public.Resource compels the conclusion that the IRS is required to produce records in native format or create load files in response to Facebook's FOIA requests in this case.

Finally, the Court should reject Facebook's reliance on dicta in Scudder for the proposition that because many of the records that Facebook seeks exist in native format, they are automatically readily reproducible in that form. See Pl.'s Mot. at 6 (citing 25 F.Supp. 3d at 38). In Scudder, the FOIA request sought electronic copies of 419 articles. Rather than comply, the CIA insisted on producing the records *in paper*, despite the fact that the articles were maintained electronically. Scudder, 25 F.Supp.3d at 35–36. Although the Court noted (in dicta) that it would be "highly unusual" for the CIA to avoid producing the records in electronic format, id., the decision ultimately sheds little light on this case. Scudder, which did not address the question of whether the CIA could readily reproduce records in native format or create of load files, primarily stands for the dual propositions that (1) "readily reproducible" is not synonymous with "technically feasible," and (2) the Court may consider the burden on the defendant in determining whether the documents at issue are "readily reproducible" in the requested format. Id. at 33, 38. Accordingly, Scudder does not establish that the IRS must release records in native format.

d. The FOIA Does not Obligate the IRS to Create New Records, Including Load Files, When Responding to a FOIA Request

It is well-settled that an agency is not required by FOIA to create a document that does not exist in order to satisfy a request. E.g. LaRoche v. U.S. S.E.C., 289 F. App'x 231 (9th Cir. 2008) (affirming decision that SEC not required to create ad hoc report containing data fields of interest to requester); Yeager v. Drug Enforcement Admin., 678 F.2d 315, 321 (D.C.Cir.1982) (citing NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 161–62 (1975)). A requester is entitled only to records that an agency has in fact chosen to create and retain, and the fact that the public is deprived of information that might otherwise have been available cannot be the basis for the imposition of greater duties than those required by FOIA itself. Kissinger, 445 U.S. at 151–52. FOIA "deals with 'agency records,' not information in the abstract." Forsham v. Harris, 445 U.S. 169, 185 (1980). A requester must take the agency records as he finds them. Yeager, 678 F.2d at 323; see also Students Against Genocide v. Dep't of State, 257 F.3d 828, 837 (D.C. Cir. 2001) (FOIA does not require agency to degrade satellite imagery so that it can be disclosed to the public).

An order compelling the IRS to create load files constitutes an order to create new records. The Court, however, is without authority under FOIA to direct such a result. See Yeager, 678 F.2d at 321. A load file is not simply metadata information in a different form, but fundamentally a new record created by the IRS. See, e.g., Ctr. For Pub. Integrity v. F.C.C., 505 F. Supp. 2d 106, 114 (D.D.C. 2007) (a request for a format requiring more than simple redactions is a request for the creation of a new record that is not authorized by FOIA); see also Yeager, 678 F.2d at 322–23 (request to manipulate or restructure record information in such a way to make it disclosable is not required to satisfy a FOIA request). As the United States District Court for the District of Columbia observed, requiring an agency to produce metadata and blind copy addresses of all emails, when that information cannot be readily produced . . . fails as a matter of law . . . [because it] would require the creation of documentation rather than the production of what exists." CREW, 905 F. Supp. 2d at

172. Accordingly, the Court should grant the government's motion for summary judgment and hold that the FOIA does not obligate the IRS to create load files.

III. THE COURT SHOULD REJECT FACEBOOK'S REMAINING ARGUMENTS FROM ITS MOTION TO COMPEL

In addition to the arguments referred to above, Facebook's motion to compel asserts that the IRS is obligated to either create load files or produce records in native format in light of the Federal Rules of Civil Procedure that govern discovery. Specifically, Facebook urges the Court to apply Fed. R. Civ. P. 34[12] to hold that, "to the extent the IRS elects not to produce a file in its native form . . . the IRS [should be required] to produce the metadata with the converted record" in a load file. Pl.'s Mot. at 10. The Court should reject this argument.

In a footnote, Facebook concedes that it could not find any legal authority for the proposition that "the discovery rules govern FOIA productions." Pl.'s Mot. at 11 n.3. This is not surprising, because such authority does not exist. FOIA is governed by decisions applying the statutory language and that of the agency regulations promulgated thereunder. To hold otherwise would conflate the public's *statutory* right to information under the FOIA with a litigant's right to discovery under the rapidly evolving federal rules of civil procedure. Courts have rejected such requests in other contexts, and the Court should do so here. Cf. Mohammed v. Mukasey, 280 F. App'x 58, 60 (2d Cir. 2008) (summary order) (noting, in deportation context, that Federal Rules of Civil Procedure have no application to administrative proceedings); McClelland v. Andrus, 606 F.2d 1278, 1285 (D.C. Cir. 1979) ("The extent of discovery that a party engaged in an administrative hearing is entitled to is primarily determined by the particular agency: both the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure are inapplicable . . . .").
Fundamentally, Rule 34 is a civil discovery rule that governs responses to document requests during litigation; it does not govern pre- or post-litigation FOIA proceeding, either directly or by analogy.[13]

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[12] Rule 34(b)(2)(E)(ii) provides that "If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms."

[13] For this reason, the Court should reject Facebook's reliance on cases that hold, in the context of civil discovery or under the Federal Records Act, "that metadata is an integral component of governmental records," Pl.'s Mot. at 9. Cf. Piper v. U.S. Dept. of Justice, 294 F.Supp.2d 16 (D.D.C. 2003) (whether or not agency complies with recordkeeping responsibilities is immaterial to

Given the critical (if subtle) differences between FOIA and discovery, it is not surprising that records that are disclosable in one context are properly withheld in the other. Consider, for example, if this Court concluded—as a matter of law—that a FOIA request for "electronic records" presumptively includes metadata. Overnight, *every* federal agency would be on notice of a new obligation to search for, review, redact, and somehow produce metadata in response to *every* FOIA request for electronic records. Because the FOIA—unlike Rule 26 discovery—does not have an analogous "escape hatch" for record requests that seek information that is "irrelevant" or "disproportional to the needs of the case," this new obligation to produce metadata would exist despite the fact that metadata will almost never convey information of any real public interest. Such a result does not contribute to the overarching purpose of FOIA, which "is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[14] N.L.R.B., 437 U.S. at 242. Accordingly, the Court should reject Facebook's request to hold that the Federal Rules of Civil Procedure governing discovery govern FOIA productions.

IV. CONCLUSION

As explained above, this Court lacks jurisdiction to compel the IRS to release records in native format or to create load files because Facebook failed to exhaust its administrative remedies. Even if jurisdiction were not lacking, the IRS is not obligated to release records in native format or to create load files where, as here, the doing so is not technically feasible. Even if the IRS could review and release records in native format or with load files, the immense burden of reviewing and redacting such materials makes them not "readily reproducible." Moreover, the FOIA does not obligate the IRS to create load files (or any other type of record) where, as here, such records did not

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reasonableness of FOIA search). Facebook's reliance on state court cases interpreting state disclosure statutes is also misplaced, as those decisions do not, by definition, involve the application of language found at 5 U.S.C. § 552 or its implementing regulations.

[14] There may indeed come a day when agencies are required to disclose metadata or create load files on upon receipt of a FOIA request. At present, however, neither the text of the statute nor the legislative history behind the 1996 E-FOIA amendments support finding such an obligation. Particularly given the enormous costs and limited public benefit, Congress should have the first opportunity to decide the circumstances under which an agency should be compelled to produce metadata in response to a FOIA request.

exist at the time of the original FOIA request. Accordingly, the Court should grant the IRS's motion for partial summary judgment, and deny Facebook's motion to compel.

DATE: May 12, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on May 12, 2017, Defendant achieved service of the foregoing **Cross-Motion and Response in Opposition** via the Court's ECF system to all parties.

/s/ Richard J. Hagerman
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